LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 5 1963
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 667

WILLIAM SMITH, JR.,

Petitioner,

vs.

STATE OF MISSISSIPPI,

Respondent.

BRIEF FOR PETITIONER

MELVIN L. WULF
ROWLAND WATTS
American Civil Liberties Union
156 Fifth Avenue
New York 10, New York

MORRIS B. ABRAM
575 Madison Avenue
New York, New York
Attorneys for Petitioner

STANLEY A. ZIMMERMAN
NORMAN DORSEN
DAVID N. ELLENHORN
WILLIAM L. HIGGS
Of Counsel

INDEX

SUBJECT INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	2
Summary of Argument	6
Argument	8
I. Right to Counsel: Petitioner was deprived of due process because he was denied counsel from the time of his arrest for a period of fifty-three days and was denied effective assistance of counsel at trial	8
A. Lack of counsel immediately upon arrest irreparably prejudiced petitioner in violation of the Fourteenth Amendment	8
B. Under *Hamilton* v. *Alabama*, 368 U.S. 52, Petitioner was denied due process when he was deprived of counsel at the time of the preliminary hearing	12
C. The petitioner was denied a fair trial by the failure of his court-appointed counsel to represent him effectively	16
II. The Confession	32
A. Petitioner's confession was inadmissible at trial because it was the fruit of an illegal arrest	32

PAGE

B. The confession was obtained during a period of unconstitutional detention and was therefore inadmissible 34

C. The petitioner's conviction was based on an involuntary confession 35

D. The jury was misdirected by wrong constitutional standards when instructed by the trial court on its treatment of the alleged confession 40

Conclusion 43

Appendix 45

CASES:

Avery v. *Alabama*, 308 U.S. 444 (1939) 19, 20, 23
Betts v. *Brady*, 316 U.S. 455 (1942) 24, 25, 26, 27
Blackburn v. *Alabama*, 361 U.S. 199 (1960) 11
Brooks v. *State*, 178 Miss. 575, 173 So. 409 ( ) 41
Brubaker v. *Dickson*, 310 F.2d 30 (CA 9, 1962) 22, 23
Carroll v. *United States*, 267 U.S. 132 (1925) 33
Cicenia v. *LaGay*, 357 U.S. 504 (1958) 9, 10
Commonwealth v. *O'Keefe*, 198 Pa. 169 ( ) 19
Crooker v. *California*, 357 U.S. 433 (1957) 6, 8, 9, 10, 11
Culombe v. *Connecticut*, 367 U.S. 568 (1961) 40, 42
Fikes v. *Alabama*, 352 U.S. 191 (1957) 35, 37
Forman v. *State*, —— Miss. ——, 70 So.2d 848 ( ) 41
Gallegos v. *Colorado*, 370 U.S. 49 (1962) 35, 37
Griffith v. *Rhay*, 282 F.2d 711 (9th Cir.), cert. denied, 364 U.S. 941 (1960) 10
Haley v. *Ohio*, 332 U.S. 596 (1948) 11, 12, 37
Hamilton v. *Alabama*, 368 U.S. 52 (1961) 6, 12, 13, 15, 16
Henry v. *United States*, 361 U.S. 98 (1959) 33

PAGE

Herman v. *Claudy*, 350 U.S. 116 (1955) 26
Jones v. *State*, —— Miss. ——, 88 So.2d 91 ( ) 41
Lomax v. *Texas*, 313 U.S. 544 (1941) 38
Lyons v. *Oklahoma*, 322 U.S. 596 (1944) 41, 42
MacKenna v. *Ellis*, 280 F.2d 592 (CA 5, 1960), cert. denied 368 U.S. 877 (1961) 18, 21, 22, 23
McNabb v. *United States*, 318 U.S. 332 (1943) 34
Maliuski v. *New York*, 324 U.S. 401 (1945) 38
Mallory v. *United States*, 354 U.S. 449 (1957) 34
Mapp v. *Ohio*, 367 U.S. 643 (1961) 7, 29, 33, 34
Moore v. *Michigan*, 355 U.S. 155 (1957) 26
Paoni v. *United States*, 281 F. 801 (3rd Cir. 1922) 21
Powell v. *Alabama*, 287 U.S. 45 (1932) 7, 8, 16, 17, 18, 19, 20, 22, 23, 26, 27, 28
Reck v. *Pate*, 367 U.S. 433 (1961) 40
Reece v. *Georgia*, 350 U.S. 85 (1955) 16, 31
Reeves v. *Alabama*, 348 U.S. 891 (1954) 38
Rogers v. *Richmond*, 365 U.S. 534 (1961) 41, 42
Sheffield v. *State*, 201 Miss. 133 So.2d 745 (1947) 13
Smith v. *United States*, 268 F.2d 416 (9th Cir. 1959) 41
Spano v. *New York*, 360 U.S. 315 (1959) 11, 38
Stein v. *New York*, 346 U.S. 156 (1953) 39, 42
United States v. *Carignan*, 342 U.S. 36 (1951) 35
Wade v. *Mayo*, 334 U.S. 672 (1948) 26
Weeks v. *United States*, 232 U.S. 383 (1914) 34
Wilson v. *United States*, 162 U.S. 613 (1896) 41
Winston v. *State*, 209 Miss. 799, 48 So.2d 513 (1950) 13
Wong Sun v. *United States*, 83 S.Ct. 407, 31 U.S. L. Week 4079 (U.S. January 14, 1963) 7, 32, 33, 34, 35

PAGE

STATUTES

Federal Rules of Criminal Procedure, Rule 5(a) 34
Mississippi Code (1956 ed.):
§2473 ..... 13, 34
§2508 30
§2573 13

OTHER AUTHORITIES

Madison County (Miss.) Herald 12
O'Hara, Fundamentals of Criminal Investigation (1956) 11
Paperno and Goldstein, Criminal Procedure in New York (New York, 1960) 14
Paulsen and Kadish, Criminal Law and Its Processes (Boston, 1962) 15
Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, 52 Journ. of Criminal Law 21 (1961) 11

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 667

WILLIAM SMITH, JR.,

Petitioner,

vs.

STATE OF MISSISSIPPI,

Respondent.

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Supreme Court of Mississippi affirming the conviction of the petitioner is reported at —— Miss. ——, 139 So.2d 857. It appears in the record at pages 126-127.

Jurisdiction

Petitioner was tried before a jury on September 25, 1961, found guilty of the crime of rape and sentenced to death in the Mississippi gas chamber. The Supreme Court of Mississippi affirmed the judgment and sentence on April 19, 1962, and denied a Suggestion of Error on May 15, 1962.

On December 17, 1962, this Court granted the petition for a writ of certiorari and leave to proceed *in forma*

pauperis. The execution of the death sentence is stayed by order of Mr. Justice Black dated October 5, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented

1. Whether petitioner, an indigent Negro convicted of raping a white woman and sentenced to death, was denied the right to counsel guaranteed by the due process clause of the Fourteenth Amendment when he was arrested on July 30, 1961 but not assigned counsel until September 21, 1961, though in custody at all times.

2. Whether petitioner was denied the effective assistance of counsel guaranteed by the due process clause of the Fourteenth Amendment.

3. Whether the petitioner was denied due process of law guaranteed by the Fourteenth Amendment where a confession introduced at trial against him (1) was the fruit of an illegal arrest; (2) was the fruit of an unconstitutional detention; (3) was obtained by physical and psychological coercion; and (4) was submitted to the jury under instructions in conflict with constitutional standards.

Statement of the Case

William Smith, Jr., the petitioner, a twenty-six year old Negro farmhand, attended school for two years. He was indicted for the crime of rape of a fourteen year old white girl in Madison County, Mississippi. He was tried before an all-white jury, found guilty, and sentenced to death.

The crime, according to the testimony of Aleece Gober, the alleged victim, and James Myers, occurred between

midnight and 2 A.M. on July 30, 1961, in the following manner:

James Myers, age 17 years, and Aleece Gober were parked in "a lovers lane" (R. 38); at about midnight a Negro opened the door on the right side of the car where Myers was sitting, stuck a knife at him (the purported weapon, a pocket knife with advertising on the side and a two-inch blade, was admitted into evidence at R. 99) and demanded everything he had—a watch and a billfold (R. 30). The Negro got in the car and on learning that Aleece could not drive, made them change places (R. 31). Myers drove about a mile and turned off to a gate. They got out of the car and went through a barbed wire fence about 200 feet into a cornfield with the Negro bringing up the rear (R. 31-36). Myers, on order, laid on the ground and put his face down (R. 34). The Negro forced Aleece to remove her shorts and underpants, made her lie down next to Myers on her back, and laid on top of her (R. 34-35). He had intercourse with her for about one-half hour (R. 49), during which time she cut her hand by trying to grab the knife (R. 44). They all got up, Aleece put on her outer shorts and they returned to the car through the barbed wire fence (R. 50). The Negro drove around "real fast" while making them keep their heads down on the floor-board, took them back to where they had been parked, searched the glove compartment, the back seat, and under the back seat for a gun, without success, and they sat and he talked. He warned them to stay down and left saying he would leave the car keys at the fork of the road (R. 51). They remained for about 10 minutes and then cut across a cotton field to a farm house (R. 51), which was about 700 to 800 feet from the road on which they were parked (R. 25), where they arrived at about 2 A.M. (R. 24).

The medical examination at about 3:30 A.M. at the Canton Hospital indicated that Aleece Gober had recently

had forcible sexual intercourse, and that it was her first intercourse (R. 55, 60).

Manner of Arrest and Detention

The sheriff who was called to the scene ordered bloodhounds and saw a dog with a patrolman follow a scent across a cornfield "in direction of the sawmill quarters" (R. 16). No testimony was offered as to where this dog went but Smith, who lived in the sawmill quarters, was arrested in his home at about 4 A.M. (R. 86, 87). He was taken to the Canton Police Department and transferred to the county jail "along with several others that we picked up. He was placed in a lineup with approximately eight or nine other suspects" (R. 76). He was taken later in the morning to Hinds County to the Mississippi Highway Patrol office in Jackson, where he was interrogated at length by five armed officers (R. 70, 78) and was subjected to a lie detector test (R. 77). He was told that he better confess because the machine showed that he was lying (R. 80). He signed the statement admitted into evidence as a confession at about 4 P.M. Thereafter, he was returned to Madison County, a search warrant was obtained and a watch, knife, and a pair of khaki pants were taken from his home. On the following day, upon motion of the District Attorney that "the facilities of the county jail . . . are inadequate for the safekeeping of the defendant and the Court . . . finds that the motion is well taken," petitioner was removed to the Hinds County jail (R. 2).

Counsel

Petitioner was arrested on July 30, 1961. He was indicted on September 20, 1961. Petitioner was unable to afford counsel and was without counsel for fifty-three days. Counsel was appointed on September 21, 1961 and peti-

tioner was arraigned the same day. On the following day, Friday, September 22, 1961, petitioner's court-appointed counsel announced that "he was ready for trial" on Monday, September 25, 1961 (R. 3).

Despite the fact that court-appointed counsel had only a week-end to prepare his case, he did not ask for a continuance. We do not know what steps he took to prepare for trial but as is shown from petitioner's wife's affidavit dated February 6, 1963, court-appointed counsel refused to speak to her before trial although she claimed to have important information material to the defense.[1]

In addition to neglecting to confer with Mrs. Smith as an indispensable part of his preparation for trial, court-appointed counsel failed to afford his client effective representation in the following ways:

1. He failed to ask for a continuance in order to have adequate time to prepare the defense.

2. He failed to move for a change of venue although his client's alleged rape of a white girl had been published in the community and petitioner claimed he had been threatened with mob action.

3. He failed to inquire whether Negroes were systematically excluded from the grand jury and from the venire called for the petit jury.

4. He failed to have his client examined by a psychiatrist to determine whether a defense of insanity could be raised.

---

[1] Appendix. Although not regular practice, several affidavits have been set out in the appendix to this brief in support of petitioner's contentions. They are offered not to establish the truth of their contents but for consideration in evaluating the competency of court-appointed counsel's representation.

5. His examination and cross-examination on the coerced confession issue were superficial and totally inadequate..

6. He failed to cross-examine the alleged victim. His cross-examination of James Myers was superficial and totally inadequate.

7. He failed to introduce any witnesses for the defense although witnesses with material information were available.

SUMMARY OF ARGUMENT

I.

Right to Counsel

Petitioner, an indigent, was arrested July 30, 1961 and was without counsel until an attorney was appointed by the court to represent him on September 21, 1961, a period of fifty-three days. The denial of counsel immediately upon arrest denied petitioner, a twenty-five year old Negro with a second grade education, due process of law. *Crooker* v. *California*, 357 U.S. 433. The absence of counsel was fatally prejudicial because petitioner was unaware of his right to remain silent in the face of prolonged interrogation by the police.

Petitioner, without advice of counsel, waived preliminary examination, a crucial stage of the proceedings. *Hamilton* v. *Alabama*, 368 U.S. 52. Whether or not to waive preliminary examination is a decision that can only be made intelligently by an experienced attorney. Denial of counsel, therefore, in these circumstances is a denial of due process.

Powell v. *Alabama*, 287 U.S. 45, requires that assistance of counsel at trial be effective assistance, rather than "pro forma." Petitioner had a particular need for effective counsel because he was faced with a capital charge and because he was young, uneducated, unintelligent, the case was complex, and the atmosphere prejudicial. Court-appointed counsel, however, failed to investigate though potential witnesses sought to confer with him, he took no time to prepare, he failed to move for a change of venue, he failed to look into the question of systematic exclusion of Negroes from the grand and petit juries, he failed to examine the state's witnesses thoroughly, and he failed to produce any witnesses for the defense though several were available.

II.

The Confession

Petitioner was arrrested without probable cause. The confession obtained from him while under illegal arrest was therefore inadmissible at trial. *Wong Sun* v. *United States*, 31 U.S. L. Week 4079. Likewise, the confession was inadmissible because it was obtained during a period of unconstitutional detention. *Mapp* v. *Ohio*, 367 U.S. 643.

Whether or not inadmissible for either of the two foregoing reasons, the confession was inadmissible because it was involuntarily extracted from petitioner. The totality of circumstances compel the conclusion that the confession was given as the result of an "overborne will." In addition, in submitting the confession to the jury, the trial court's instructions failed to meet constitutional standards.

ARGUMENT

I.

Right to Counsel

Petitioner Was Deprived of Due Process Because He Was Denied Counsel From the Time of Arrest for a Period of Fifty-three Days and Was Denied Effective Assistance of Counsel at Trial.

The present conviction is invalid under the Fourteenth Amendment because petitioner was deprived of his right to counsel during two critical points of the proceedings. First, immediately after his arrest, he was forced to undergo intensive and coercive questioning about his alleged participation in a rape without the assistance of a lawyer. Second, after the confession was extracted by the police, the State failed to provide the petitioner with counsel in time to represent him at his preliminary hearing where petitioner's substantial rights could have been preserved. He was also denied effective assistance of counsel at trial.

A. Lack of Counsel Immediately Upon Arrest Irreparably Prejudiced Petitioner in Violation of the Fourteenth Amendment.

An individual accused of a capital crime has the right to the assistance of counsel under the Due Process clause of the Fourteenth Amendment. *Powell* v. *Alabama*, 287 U.S. 45 (1932). This right exists not only with respect to the trial itself, but as to the pretrial proceedings. As the Court stated in *Crooker* v. *California*, 357 U.S. 433, 439-40 (1957):

> "[S]tate refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits . . . but also if he is deprived of counsel for any part of the pretrial proceedings,

> provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.' . . . The latter determination necessarily depends upon all the circumstances of the case."

In the *Crooker* case, the Court held that the petitioner was not deprived of due process even though he was not afforded the benefit of counsel immediately after his arrest. The Court reasoned that the petitioner was not "prejudiced" since his case was one of a "voluntary confession by a college educated man with law school training who knew of his right to keep silent." 357 U.S. at 440. The companion case of *Cicenia* v. *LaGay*, 357 U.S. 504 (1958), reached the same conclusion, again on the basis of the special circumstances existing in that case. There, the petitioner already had retained and consulted his family lawyer, and the Court could proceed on the assumption that the petitioner had been informed of his constitutional rights.

The present case is markedly different from both *Crooker* and *Cicenia*. The petitioner here did not come to the police, as did Crooker, with a college degree, or, as did Cicenia, from the arms of his lawyer. Instead, he was a frightened, inarticulate Negro with a second grade education, charged with the rape of a 14 year old white girl in Mississippi. If ever "all the circumstances of the case" (*Crooker* v. *California, supra* at 440) make it crystal clear that a petitioner was "prejudiced" by the absence of counsel, the circumstances here compel that conclusion.

The events immediately following petitioner's arrest strikingly bear out this conclusion. From the time of his arrest, petitioner was under sustained interrogation and examination. Shortly after his removal to Hinds County, the petitioner was subjected to a polygraph test and to a

gruelling session with the police as to whether he was lying when he denied committing the rape. During this entire period he existed in terror of mob violence. He testified at his trial that the only reason he confessed to the crime later that day was because "they threatened to bring me back to Canton and put me in the county jail and have a mob get me" (R. 88). It is surely not surprising that under the pressure of a determined interrogation and the polygraph test, the isolated and uneducated Negro petitioner finally agreed to confess.

In a recent unanimous decision of the Court of Appeals for the Ninth Circuit, *Griffith* v. *Rhay*, 282 F.2d 711 (9th Cir.), *cert. denied*, 364 U.S. 941 (1960), a conviction for murder was reversed on the ground that the defendant was "prejudiced" within the meaning of the *Crooker* case. Griffith was a murder suspect who was interrogated and confessed while a hospital patient following serious surgery and while under the influence of a drug. Although he was warned that anything he said could be used against him, he was not told that he did not have to answer, nor was he asked if he had a lawyer or told that a lawyer could be provided if he desired. He did not ask for a lawyer. The court held that Griffith was prejudiced by the absence of counsel since there was no indication that he knew of his right to remain silent. Counsel would undoubtedly have advised him of his rights and, under the circumstances, would probably have advised him to remain silent. The Court specifically distinguished the circumstances surrounding the confessions in *Crooker* and *Cicenia*, pointing out that Griffith was neither a "college graduate who had attended the first year of law school" nor denied access to a retained attorney by whom he "was presumably advised of his rights."

That the prejudice here warrants a reversal under the rule of *Crooker* and *Griffith* is even clearer when it is seen

in the perspective of traditional police methods of interrogation. Speaking for the Court in *Blackburn* v. *Alabama*, 361 U.S. 199, 206 (1960), the Chief Justice said:

> "Since *Chambers* v. *Florida*, 309 U.S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition . . . A prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror."

Or, in the words of Justice Douglas, in *Crooker* v. *California*, 357 U.S. at 443 (dissenting opinion) "The pattern of the third degree runs through our cases: a lone suspect unrepresented by counsel against whom the full coercive force of a secret inquisition is brought to bear." See also *Spano* v. *New York*, 360 U.S. 315, 327 (1959) (Stewart, *J.* concurring). Judicial disapproval of oppressive third degree methods has been consistent with disclosures made by the police themselves.[2]

It is true that the Mississippi police officers testified that petitioner was advised of his right to counsel before he confessed. But it is clear that even if such advice was actually given, it came too late and was entirely ineffectual. In *Haley* v. *Ohio*, 332 U.S. 596 (1948), the Court disposed of a similar claim by pointing out that the defendant in that case, without aid of counsel, would have neither a full

---

[2] For example, one police manual says: ". . . where emotional appeals and tricks are employed to no avail [the investigator] must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease." O'Hara, Fundamentals of Criminal Investigation, 108, 112 (1956). Cited in Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, 52 Journ. of Crim. Law, Criminology and Police Science 21 (1961).

appreciation of the advice nor "freedom of choice". The Court in *Haley* refused to "indulge these assumptions" and they cannot be indulged here in the case of an ignorant and frightened defendant. Furthermore, by the time petitioner was allegedly told that he could speak to a lawyer, he had already committed himself to escaping further interrogation by satisfying those who were keeping him isolated and in fear. The damage had been done, and the confession as good as over. In fact, he never saw a lawyer until counsel was assigned fifty-three days after his arrest. Surely such a procedure does not satisfy the requirements of due process.

B. Under *Hamilton* v. *Alabama*, 368 U.S. 52, Petitioner Was Denied Due Process When He Was Deprived of Counsel at the Time of the Preliminary Hearing.

In *Hamilton* v. *Alabama*, 368 U.S. 52, the petitioner was arraigned without counsel for a capital offense, and subsequently was convicted and sentenced to death. The Court held that the petitioner was deprived of due process because the denial of counsel at the time of arraignment denied petitioner important rights under Alabama law.

The *Hamilton* case stands for the proposition that when a defendant is required to appear at a "critical stage" in a criminal proceeding without counsel, and therefore without knowledge of his rights, a subsequent conviction is invalid. In that case, because of the absence of counsel, the petitioner lost the right to plead insanity, to enter pleas in abatement, and to attack the legality of the grand jury.

In the case at bar, petitioner waived examination on his own (Madison County (Miss.) Herald, August 3, 1961, p. 2), without being able to consult with counsel. He lost the benefit of skilled counsel to decide whether or not this course was wise.

The Mississippi Code provides:

> "Every person making an arrest shall take the offender before the proper officer without necessary delay for examination of his case." Miss. Code (1956 ed.), §2473.

The Mississippi Supreme Court has emphasized that §2473 "positively requires" that a prompt hearing be granted. *Winston* v. *State*, 209 Miss. 799, 48 So.2d 513 (1950). In *Sheffield* v. *State*, 201 Miss. 133, 28 So.2d 745, 746-747 (1947), the Court explained that its purpose is:

> "... to prevent an arresting officer or private person from detaining a person for an unreasonable length of time, whether arrested with or without a warrant, for any indictable offense committed in his presence, or where the arrest is made on probable cause or suspicion that the accused has committed a felony, without affording him an opportunity to have a hearing on the merits of the accusations against him. One thus arrested may, in some instances, be unable to execute a bail bond, but he is nevertheless entitled, in such event to have his case examined into without unnecessary delay."

Accordingly, Mississippi law clearly requires the State to present a prima facie case against the petitioner before an impartial judicial officer, unless intelligently waived by the accused.[3] By failing to appoint counsel prior to the hearing, the State deprived the petitioner of important rights and, therefore, under *Hamilton*, of due process of law.

---

[3] At the examination, the Magistrate is also charged with the duty of instituting commitment proceedings "if it shall appear that the prisoner was insane when the offense was committed, and still is insane." Miss. Code (1956 ed.), §2573.

There is no question that a preliminary examination is a crucial step in the defense of a criminal case. Its importance has been described in the following words:

> "As a general rule, a preliminary examination should never be waived. Counsel should utilize every opportunity, instead, to obtain all possible information about the details, and the nature, of the charges filed against his client. He should particularly try to learn all the facts known by the prosecution witnesses, which might prove favorable to the defense. To this end, he might consider permitting these witnesses to testify freely, without interposing all the objections available to him by the rules of evidence. He should also forego no opportunity to cross-examine these witnesses. . . .
>
> * * * * *
>
> "Counsel should waive examination if he feels that the proof now in control of the District Attorney will not be available to the prosecution at the trial, particularly if some of the witnesses live outside the state or are about to depart therefrom." Paperno and Goldstein, Criminal Procedure in New York (New York, 1960) 33.

On the other hand, the dangers of a preliminary examination have also been pointed out.

> "In many other cases, however, the advantages [of a preliminary examination] are illusory, while the disadvantages may be real. Consider the following: (1) The publicity may be vastly increased, by getting morbid details in the hands of the press, so that it is harder to get a jury. (2) A witness may be important to the prosecution, yet, if he does not testify in a hearing, subject to cross-examination, his testimony is not perpetuated. Thus if he dies or disappears before trial, his testimony may not be read and the case may fall.

(3) A witness may have a change of heart after the lapse of time. . . . If he has not committed himself in sworn testimony at the hearing, his testimony at the trial may be somewhat more favorable than might otherwise be the case. (4) Once you have cross-examined a witness in court, he is more likely to identify himself with the prosecutor's side and resist any interviews. He is more likely to throw himself enthusiastically into the opposition's camp.

"Of course, if you think the prosecution witness is lying, or confused, you may want to pin him down, but, for heaven's sake, don't educate him by confronting him with your weapons so that he is afforded a chance to straighten himself out." Steinberg and Paulsen, A Conversation With Defense Counsel on Problems of a Criminal Defense. 7 Prac. Law 25, 30 (May, 1961), quoted in Paulsen and Kadish, Criminal Law and Its Processes (Boston, 1962) 919.

It is plain to see, therefore, that the question whether or not to hold a preliminary examination can be answered only by a lawyer who understands both its advantages and perils to his client and whose experience and intuition is carefully tuned to every consideration. It is hardly the kind of judgment that could intelligently be made by any layman, no less a man with a second grade education charged with a capital crime.

But it is not necessary to guess what prejudice resulted from the failure to have counsel assigned at the time of the preliminary examination. Certainly, the "degree of prejudice can never be known" (*Hamilton* v. *Alabama, supra* at 55) at this remove. Rather, the Due Process clause is violated whenever a defendant in a capital case is denied the opportunity to have the assistance of counsel at a pre-

liminary proceeding. *Hamilton* v. *Alabama*, *supra*; *Reece* v. *Georgia*, 350 U.S. 85; *Powell* v. *Alabama*, *supra*.

It is no answer, of course, for Mississippi to say that the petitioner "waived" his right to a preliminary proceeding. He needed a lawyer for the very purpose of deciding whether to waive or to insist that the hearing be held. If a valuable right could have been realized at that time, *Hamilton* bars the State from denying it to the petitioner on the ground he surrendered it. Indeed, it is absurd to say that this almost totally uneducated and inarticulate individual, acting under severe emotional stress, could have knowingly waived the substantial legal advantages possibly available to him in a preliminary proceeding.

It is clear that the petitioner was deprived of due process when, without the assistance of counsel, he was subjected to a police inquisition and compelled to forfeit a preliminary proceeding at which the State was required to make known to him the precise charges and evidence upon which his life hinged.

C. The Petitioner Was Denied a Fair Trial by the Failure of His Court-Appointed Counsel to Represent Him Effectively.

The Need to Look Beyond the Record

The question of petitioner's failure to be represented by competent counsel in a state capital case was first raised as a federal constitutional issue in the Suggestion of Error filed by his new attorneys in the Mississippi Supreme Court on May 7, 1962. This Suggestion was denied.

Bringing the question of competence of counsel before this Court presents a rather special procedural problem. Usually this Court's scrutiny of a case is limited to the record. In this case, however, almost all the information

relevant to counsel's competence must necessarily be found outside the record. Any judgment on effectiveness of counsel involves a comparison of what the attorney did for his client with what he might have done, had he taken reasonable time and reasonable pains to prepare his case. What the court-appointed attorney in this case did for his client is found in his trial record. What he might have done is only partially to be found in the record. Most of the facts he should have investigated and could have introduced into evidence are to be found in the affidavits included in the appendix to this brief. We do not claim their contents are true; we do claim they justified investigation.

1. *Powell* v. *Alabama*: *The Meaning of Effectiveness.*

In *Powell* v. *Alabama*[4] this Court established the rule that every defendant in a capital case in a state court must be furnished with counsel. The court went well beyond asserting the mere right to counsel. It put flesh on the bare bones of its pronouncement. Counsel is no counsel unless effective counsel; counsel "zealous and active" rather than "pro forma".[5] Speaking for the Court in *Powell*, Mr. Justice Sutherland refers to the right to counsel in the "substantial sense" and refuses to "ignore actualities".

> "In a capital case, where the defendant is . . . incapable adequately of making his own defense because of ignorance . . . illiteracy or the like, it is the duty of the Court . . . to assign counsel for him as a necessary requisite of due process of law; and the duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."[6]

---

[4] 287 U. S. 45 (1932).
[5] *Id.* at 58.
[6] *Id.* at 71.

Out of an analysis of the cases in this area, several guiding principles have emerged as to what the Court means when it tries to define effective counsel.

a. *Counsel Most Likely to Be Effective Is Counsel of One's Own Choice.*

In *Powell* the Court said that "the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of one's own choice."[7] One of the central reasons for reversing the conviction in the recent circuit court case of *MacKenna* v. *Ellis*[8] was that inadequate court appointed counsel were forced on the defendant over his protest. A similar situation existed in the instant case. Smith did not have an adequate opportunity to get his own lawyer. He was held incommunicado over the summer. Counsel was appointed just a few days before the trial and refused to see Mrs. Smith over the weekend when she tried to give him highly relevant evidence. Realizing that the state had appointed a lawyer who was too busy with other matters to be interested in her husband's case, Mrs. Smith moved as promptly as she could under the circumstances and contacted William Higgs, Esq., a lawyer in Jackson. Higgs called the judge on the morning of the trial and asked permission to enter the case at the request of defendant's wife. He was refused this permission and was told that if he tried to enter it would mean serious trouble for him.[10]

---

[7] *Id.* at 53.

[8] See Affidavit of Mary Nell Smith, petitioner's wife, Appendix.

[9] 280 F.2d 592, cert. denied, 368 U.S. 877 (1961).

[10] See Affidavit of William Higgs, Appendix.

b. *If Counsel Is Appointed by the Court, He Must Have a Chance to Make a Thorough Investigation of His Client's Case.*

The Court in *Powell*, quoting with approval *Commonwealth* v. *O'Keefe*,[11] said:

> "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case."

In the present case, counsel was appointed by the state just a few days before the trial, which gave him scant opportunity to contact witnesses or ferret out any relevant psychiatric evidence. It must also be borne in mind that adequacy of preparation is not an element to be weighed in the balance with other factors. If there has been inadequate preparation, "due process" has been denied.

c. *The Court Looks at the Quality of the Investigation That Counsel Has Conducted.*

In *Avery* v. *Alabama*[12] two lawyers were appointed for a defendant charged with murder three days before the trial. The Court said that the sole question was whether the defendant was denied the right of counsel "with the accustomed incidents of consultation and opportunity of preparation for trial." [12a] Although the time for preparation was short, the Court looked at the quality of counsel's performance during the investigation period. The Court, speaking through Justice Black, found that counsel had

---

[11] 298 Pa. 169, 173.

[12] 308 U.S. 444.

[12a] *Id.* at 445.

well utilized the limited time allotted them. They had been zealous and active.

> "That the examination and preparation of the case . . . had been adequate for counsel to exhaust its every angle is illuminated by the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted." [13]

Despite the shortness of time the Court upheld the conviction finding that over the whole course of the proceedings there was not a denial of fundamental fairness.

In contrast, however, the investigation here was quite the opposite of "exhausting every angle". It is not known how long court-appointed counsel consulted with petitioner, but he refused to see Mrs. Smith or listen to her evidence, nor did he make any inquiries of petitioner's family or friends. What the Court said of the lawyers in *Powell* must also cover the conduct of counsel here.

> "It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough going investigation might disclose as to the facts. No attempt was made to investigate. . . ." [14]

d. *The Court Has a More Difficult Time Passing Judgment on Counsel's Tactics at the Trial.*

Generally, a large amount of discretion must be given counsel while conducting a trial and courts are reluctant to

[13] 308 U.S. at 452.

[14] 287 U.S. at 58.

find an abuse of that discretion. Any standard for determining whether adequate skill was exhibited by counsel at the trial is subjective at best, and in deciding on counsel's competence the Court has leaned heavily on more objective factors—such as insufficient time to prepare or insufficient preparation in fact, notwithstanding the time allotted. Suffice it to say that in the instant case counsel brought forth no witnesses for the defendant, nor did he introduce any evidence for the defense.

To delve further into the language of the cases dealing with the right to effective counsel would be an unnecessary use of this Court's time. Petitioner does feel, however, that two recent decisions of the Circuit Court of Appeals should be brought to this Court's attention. The first of these is *MacKenna* v. *Ellis*,[15] decided by the Fifth Circuit in 1960. MacKenna was a college graduate and had been convicted of stealing a camera worth $250. Two young lawyers were appointed for him on Friday and the trial took place the next Tuesday. There, as here, counsel failed to move for a continuance. There was not sufficient time to contact witnesses who might have testified in MacKenna's behalf, with the result that he was convicted. The Court, in an opinion by Judge Wisdom, reversed, citing *Paoni* v. *United States*, 281 F. 801, 803 (1922).

> "To one accused of crime (the right to counsel and right to obtain witnesses) are very substantial rights. *Yet, they are barren if given at a time when assistance by counsel in issuing subpoenas is impracticable and when service of subpoenas and the appearance of witnesses is impossible.*"[16]

---

[15] Supra, note 8.

[16] 280 F.2d at 603. Emphasis added by the court in *MacKenna*. Judge Wisdom further noted that "Although *Paoni* involved the Sixth Amendment . . . the principle that controlled in *Paoni* ap-

In *MacKenna*, the court felt that it was so important for the defendant to have effective counsel that it reversed, even though the crime charged was only the theft of a $250 camera. In this case, petitioner's life is at stake.

In *Brubaker* v. *Dickson*,[17] the defendant was on trial for murder. He had a tenth grade education, having failed the eleventh grade. Postconviction examination of the defendant showed that, while not insane, he was disturbed emotionally and had a tendency to drink. His court-appointed attorney, however, had made no effort to elicit defendant's history, made no inquiries of his family, friends, or employers and failed to arrange for a psychiatric examination. Furthermore, though counsel had been appointed more than three months before trial, he had had only limited consultation with the defendant.

The court first considered the procedural problem of going outside the record.

> "We note at the outset that defendant's allegations of fact outside the trial record must be considered in determining whether the petition alleged a denial of appellant's constitutional right to the effective aid of counsel. A contrary rule would fall short of protecting this right. When inadequate representation is alleged, the critical factual inquiry ordinarily relates to matters outside the trial record, whether trial counsel consulted sufficiently with the accused, and adequately investigated the facts and the law; whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choices of trial

---

plies with equal force [to the] Fourteenth Amendment." The opportunity of an accused to meet the prosecution's case with the aid of witnesses is historically and in practice fundamental to a fair trial. *Powell* v. *Alabama* (1932), 287 U.S. 45.

[17] 310 F.2d 30.

> facts and strategy. If the petition, including appellant's allegations of fact outside the trial record, presents grounds which would entitle appellant to relief, he should be afforded an opportunity to support his allegations by proof." [18]

Then the Court, citing *Powell* and other Supreme Court cases made its judgment on the standard for effective representations by counsel. The requirements were twofold: not only must counsel have sufficient time to prepare his case, but he must *in fact* have rendered adequate service to his client. The Court concluded that Brubaker's trial had not met these requirements.

> "Appellant does not complain that after investigation and research trial counsel made decisions of tactics and strategy injurious to appellant's cause; the allegation is rather that trial counsel failed to prepare and that appellant's defense was withheld not through deliberate though faulty judgment, but in default of knowledge that reasonable inquiry would have produced and hence in default of any judgment at all. The omissions alleged by appellant 'were not mistakes of counsel or errors in the course of the trial. If true, they constitute a total failure to present the cause of the accused in any fundamental respect. . . . ' " [19]

Petitioner submits that, given the circumstances of this case, he comes clearly within the rationale of *Powell*, *Avery*, *MacKenna* and *Brubaker* and that his case, like theirs, should be reversed for lack of "due process."

---

[18] 310 F.2d at 32.

[19] 310 F.2d at 39.

2. *Petitioner Had a Particular Need for Effective Counsel.*

Betts v. *Brady*,[20] and the cases stemming from it, stand for the proposition that there is no inherent right to any counsel whatsoever in a state non-capital criminal case. Whether the assistance of counsel is a necessary ingredient of due process under the Fourteenth Amendment depends on the circumstances.

> ". . . denial (of due process) is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness . . . may in other circumstances . . . fall short of such denial." [21]

The instant case is not a *Betts* v. *Brady* case. Petitioner did have counsel physically present. Moreover, petitioner was being tried for a capital crime, a situation in which the right to counsel is absolute. The *Betts* v. *Brady* cases are extremely important, however, for their approach to the problem of due process and the criminal defendant. This is the type of case which has most often been before the Court, and, in a deeper sense, the Court has not only been deciding the issue of "right to counsel" versus "no right to counsel". It has also been dealing with the problem of when effective representation is most necessary. Any case deciding that a counsel must be present to satisfy due process is also, of course, a decision that such counsel must do an effective job. Otherwise his physical presence would be meaningless. And it is perfectly logical to argue that the *Betts* v. *Brady* decisions are *a fortiori* decisions of the

---

[20] 316 U.S. 455 (1942), being reconsidered this term in *Gideon* v. *Cochrane*, No. 155.

[21] 316 U.S. at 462.

instant case. For the mere presence of ineffective counsel—ineffective because he has not been given or taken enough time properly to prepare a capital case—can be even more damaging to a defendant than the presence of no counsel at all. The presence of ineffective counsel is insidious because it can deceive a reviewing tribunal into believing that the substance of justice has been meted out, whereas, in reality, only the forms of justice have been hurried through. And it is insidious also because a defendant, too ignorant or poor to employ counsel of his own choice, can be lulled into the false security that court appointed counsel will prosecute his defense "zealously and actively" rather than ineffectively. Thus he may bypass the opportunity to bring forth witnesses who might have been summoned had the accused pleaded his own cause.

The "absence of counsel", non-capital, *Betts* v. *Brady* cases are instructive primarily for their approach to "due process." "Due process" is a fluid concept and the presence of counsel is only one of a number of factors which make it up. In making its judgment whether lack of counsel at a given stage in the case has been so prejudicial as to amount to a lack of "due process," the Court has looked primarily at the needs of the defendant. The more serious the crime and the more likely the danger of prejudice against the accused, the more insistent have been the Court's demands for representation by counsel. This same reasoning must also carry over in formulating a "due process" standard for the effectiveness of counsel. In a capital case, of course, counsel must at least be present. That is the floor below which the Supreme Court has not gone. Petitioner submits that in addition to this minimum the Court should be especially vigilant to require counsel to be particularly effective when certain circumstances, the circumstances pointed to in the *Betts* v. *Brady* cases, are present.

The following factors have led to requiring the presence of counsel in non-capital cases and should, correspondingly, require especially effective counsel in a capital case.

1. The ignorance of the accused.

2. His lack of education.[22]

3. His youth.[23]

4. The accused's previous experience with the law and familiarity with legal procedures.[24]

5. Whether the legal issues being tried are complex.[25]

6. Whether the case is being tried in an atmosphere of prejudice.[26]

If these criteria are accepted as measuring rods for requiring special diligence on the part of counsel, it at once becomes clear that the need for effective representation was most urgent in this case. At the time of the crime William Smith was a young Negro, twenty-five years old. He had only a second grade education and was illiterate. Furthermore, this Court is asked to take judicial notice of

---

[22] See *Moore* v. *Michigan*, 355 U.S. 155. Here the accused, a seventeen year old Negro with only a seventh-grade education pleaded guilty to murder and was sentenced to life. The Supreme Court reversed, concluding that his right to counsel was not freely and intelligently waived.

[23] See *Herman* v. *Claudy*, 350 U.S. 116. Defendant was only twenty-one years old and had only six years of schooling.

[24] See *Betts* v. *Brady*, 316 U.S. 455, 472.

[25] See *Herman* v. *Claudy*, 350 U.S. 116. But see *Wade* v. *Mayo*, 334 U.S. 672, 684 (1948): "There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature."

[26] *Powell* v. *Alabama*, 287 U.S. 45.

the fact that the State of Mississippi was, at the time of the trial, a hotbed of hostility to Negroes.

Therefore, if the question whether due process has been afforded a defendant is a judgment to be made "on all the circumstances of the case," petitioner presents very compelling circumstances for enforcing the mandate of *Powell* v. *Alabama* most scrupulously. Given then the cluster of circumstances which made pressing the need for effective representation of petitioner and given also his attorney's utter failure to act zealously in his behalf, petitioner submits that his conviction is "offensive to the common and fundamental ideas of fairness and right" [27] and that it cannot be upheld.

3. *Counsel's Conduct in This Case Does Not Amount to Effective Representation Sufficient to Satisfy the Requirements of the Due Process Clause of the Fourteenth Amendment.*

Petitioner has set forth above the standard of effectiveness required by *Powell* v. *Alabama*. He has also shown that his situation is one which calls for a vigorous application of the doctrine of the *Powell* case. He has also set out the basic elements of counsel's failure to represent him adequately, especially as those failures fall within the disapproval of this Court as not affording him "due process." We proceed now with an account of how court-appointed counsel neglected his constitutional responsibilities to him.

(a) *Counsel Was Given Too Little Time in Which to Properly Prepare a Defense in a Capital Case.*

Counsel was appointed for William Smith on September 21, 1961. The trial was held in the Madison County Court-

[27] *Betts* v. *Brady*, 316 U.S. 455, 473.

house on Monday, September 25th. The jury returned a verdict of guilty that same day, and William Smith received a mandatory sentence of death in the Mississippi gas chamber.

At no time did counsel move for a continuance. Yet this Court, in *Powell v. Alabama*, has clearly indicated that to allow counsel to go to trial in a capital case under circumstances like those which surrounded William Smith's case amounts to a denial of due process. The *Powell* court was fully conscious of the evils of "the law's delay." It felt that speedy justice—provided it was justice—should be encouraged. But the court was even more wary of the insolence of office:

> "The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob." [28]

By allowing counsel to go forward with a defense in a case involving the death penalty, the State of Mississippi was equally responsible for his failure to make a "thorough-going investigation" of his client's case.

(b) *Counsel's Failure to Investigate the Facts and to Confer With Vital Witnesses Resulted in Petitioner Being Deprived of Evidence That Was Essential to His Defense.*

The competence of an attorney is measured by what he *did* for his client compared with what he might have done.

---

[28] 287 U.S. at 59.

If court-appointed counsel had talked with the people whose affidavits are annexed to this brief, he could have presented at the trial evidence of beatings which, if true, would clearly indicate that Smith's confession was coerced; evidence that these beatings so confused Smith that he was even referring to the police officers as members of his family; evidence that one of the state's most crucial exhibits at the trial—pants containing pubic hair alleged to be that of the victim—were not the pants that William Smith was wearing on the evening that the crime was committed.

The affidavits of Mrs. Smith, Julia Mae Jones, and Rosetta Body, taken together are some evidence that William Smith was severely beaten before he confessed. If evidence of such beatings had been introduced before the trial or before the appellate court, this would have been sufficient ground for the exclusion of the confession —the knife, the watch, and the pants would also have been excluded under the rule of *Mapp* v. *Ohio*, 367 U.S. 643. There is also strong evidence that petitioner was extremely confused as the result of such beatings. As it was, however, counsel made no inquiry whatever on these matters either on direct or cross. He made no such inquiries because he knew nothing about the beatings nor did he bother to find out.

One of the most telling pieces of evidence against petitioner at the trial was a pair of pants which an expert for the state testified contained pubic hair similar to the pubic hair of the victim. It was mandatory for petitioner to be able to refute such evidence. Yet when Mrs. Smith came to Mr. Greaves to give him just such counter-evidence, he refused to talk with her. If he had, he would have known that Mrs. Smith, Robert Johnson and Mrs. Jones would all have testified that petitioner was wearing grey, not khaki pants. If petitioner's lawyer had conferred with Mrs. Smith

and the other witnesses, he could assuredly have presented this evidence.

(c) *Counsel Failed to Move for a Change of Venue Although There Is Evidence That His Client's Alleged Rape of a White Girl Seriously Prejudiced Him in the Community.*

The Mississippi Change of Venue statute permits counsel to change a trial to another county if there is prejudgment or ill will against a defendant in the county in which the crime was committed.[29] There is evidence that such ill will existed against William Smith. Extensive publicity was given the case. A picture of Smith with his arms handcuffed behind his back was shown on the front page of the *Jackson Clarion Ledger* on July 31, 1961, and a page 4 story in the *Jackson Daily News* on the same day. The *Madison County Herald* had a front page story on August 3, 1961. The latter story, referring to the waiver of the preliminary examination said "The hearing was held in the Madison County Courthouse—which was cleared of people and locked—before Justice of the Peace Milton Sandidge, and then the two [Smith and Matlock] were returned to an undisclosed jail." Most importantly, on the very day after his arrest the District Attorney moved that Smith be transferred from the Madison County jail for his own safekeeping and the Madison County Circuit Court, having heard the evidence, found that the motion was well taken and ordered the transfer.[30] Nonetheless counsel did not choose to make a motion for a change of venue for his client.

---

[29] Miss. Code (1956 ed.), §2508.

[30] R. 2.

(d) *Counsel Failed to Inquire Whether Negroes Were Systematically Excluded From the Grand Jury and From the Venire Called for the Petit Jury.*

In *Reece* v. *Georgia*,[31] a right to counsel case, the Court considered the question of systematic exclusion of Negroes from the jury. It noted that no Negro had served on the grand jury in the County in which the case was tried for as long as witnesses could remember and that of 534 names on the grand jury list only 6 of this number were Negroes. The population ratio of whites to Negroes in the county in which Reece's trial took place was 16,201 male whites of voting age to 1,710 male Negroes of voting age.[32] The Court said that

> "This evidence, without more, is sufficient to make a strong showing of systematic exclusion. The sizeable Negro population in the county, the fact that all-white juries had been serving for as long as witnesses could remember, and the selection . . . of a relatively few Negroes who would probably have been disqualified for actual jury service all point to a discrimination 'ingenuous or ingenious' Smith v. Texas, 311 U.S. 128, 132."[33]

In Madison County, where William Smith's trial took place, the case for arguing systematic exclusion is much stronger. The 1960 census shows 5622 whites of voting age and 10,366 Negroes of voting age, yet only a small proportion of Negroes are able to vote each year.

Counsel, however, made no investigation of the possibility of systematic exclusion of Negroes from the juries.

---

[31] 350 U.S. 85.

[32] 350 U.S. at 88 (1950 Census figures).

[33] *Ibid.*

(e) *Counsel Made No Effort at Trial to Thoroughly Examine the State's Witnesses.*

For a discussion of counsel's neglect to investigate and examine the state's witnesses concerning the involuntary nature of the confession, see II C, infra.

The record speaks for itself concerning counsel's effort to question the alleged victim and her companion. He did not cross-examine the girl at all; his total cross-examination of her companion occupies one-and-a-half pages of the record, exactly none of which concerns the petitioner. Nowhere in the record, in fact, does either the victim or her companion identify petitioner as the culprit. Plainly, there was much to be inquired about, but counsel simply omitted to do so.

II.

The Confession

A. Petitioner's Confession Was Inadmissible at Trial Because It Was the Fruit of an Illegal Arrest.

Smith was taken into custody in his home at approximately 4 A.M. without a warrant. No evidence was introduced to show why he was arrested but in view of the fact that he was later transferred from the Police Department to the county jail "along with several others we picked up" and "placed in a line-up with eight or nine other suspects" (R. 76), it is apparent that his arrest—like that of the others who were not charged with this crime—was part of a general roundup of Negroes living in the sawmill quarter. No cause whatsoever was shown for his arrest.

The standard upon which an arrest must be based was enunciated again by this Court in *Wong Sun* v. *United States*, 31 U.S. L. Week 4079, 4081-82 (U.S. January 14, 1963):

"It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion; see *Henry* v. *United States*, 361 U.S. 98, 101, though the arresting officer need not have in hand evidence which would suffice to convict. The quantum of information which constitutes probable cause—evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed, Carroll v. United States, 267 U.S. 132, 162—must be measured by the facts of the particular case. The history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would 'leave law abiding citizens at the mercy of the officers' whim or caprice' Brinegar v. United States, 338 U.S. 16, 176."

"Whether or not requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed. *The threshold question in this case, therefore, is whether the officers could, on the information which impelled them to act, have procured a warrant for the arrest of* [the suspect]." (Emphasis supplied.)

If the officers had applied for an arrest warrant, what could they have said but that they were led to the sawmill quarter, where petitioner lived, by a bloodhound. Nothing else. The record discloses no evidence whatever on which to base a conclusion that there was probable cause for petitioner's arrest. *Wong Sun, supra; Mapp* v. *Ohio*, 367 U.S. 643; *Henry* v. *United States*, 361 U.S. 98; *Carroll* v. *United States*, 267 U.S. 132.

Wong Sun holds that verbal statements of an accused made in the course of, or as the consequence of, an illegal arrest, are inadmissible at trial.

> "... [V]erbal evidence which derives from an unlawful entry and an unauthorized arrest ... is no less the fruit of official illegality than the more common tangible fruits of the unwarranted intrusion." 31 U.S. L. Week at 4083.

There is no question from the record that petitioner's arrest was entirely fortuitous. Having been led to the sawmill quarter, the officers arbitrarily took eight or nine Negroes into custody, petitioner among them. A dragnet arrest of that sort violates constitutional standards and the confession, which was the immediate fruit of that violation, is inadmissible at trial, as are the wallet, knife and trousers, obtained as a consequence of the illegal confession.

B. The Confession Was Obtained During a Period of Unconstitutional Detention and Was Therefore Inadmissible.

As shown above, petitioner's arrest was without probable cause and therefore illegal. It was additionally illegal and unconstitutional because the petitioner was not taken "without unnecessary delay" to a magistrate as required by Mississippi law. Miss. Code (1956 ed.), §2473.

Under like circumstances petitioner's confession would be inadmissible in the federal courts. *McNabb* v. *United States*, 318 U.S. 332; *Mallory* v. *United States*, 354 U.S. 449; Rule 5(a), Federal Rules of Criminal Procedure.

Under *Mapp* v. *Ohio*, *supra*, the fruits of an illegal search are now inadmissible in state courts as they have been in the federal courts since *Weeks* v. *United States*, 232 U.S. 383. And as was said in *Wong Sun*, *supra*: "... verbal

evidence which derives so immediately from an unlawful entry and unauthorized arrest . . . is no less the 'fruit' of an official illegality than the more common tangible fruits of the unwarranted intrusion. See *Nueslin* v. *District of Columbia*, 115 F.2d 690." 31 U.S. L. Week at 4083.

Thus, a confession, like any verbal statement obtained during the course of an illegal arrest or illegal detention, should be held by this Court to be inadmissible against an accused in a state criminal prosecution. Illegal detention prior to a preliminary hearing is "a breeding ground for coerced confessions." *United States* v. *Carignan*, 342 U.S. 36, 46 (concurring opinion). By declaring that confessions obtained during periods of detention are in flagrant violation of state law, the suspicion always cast on confessions so obtained would not be removed.

C. The Petitioner's Conviction Was Based on an Involuntary Confession.

In evaluating the admissibility of a confession, this Court will examine the "totality of circumstances" surrounding the confession. *Fikes* v. *Alabama*, 352 U.S. 191; *Gallegos* v. *Colorado*, 370 U.S. 49. These include the manner and duration of detention preceding and following the disputed statement, the attitude of the police, and the age, mental capacity, and social condition of the accused.

What is the "totality of circumstances" in this case?

(a) *The petitioner.*

At the time of the crime, petitioner was a 25 year old Negro farmhand in Canton, Mississippi, who had attended school to the second grade (R. 88). According to the description of his counsel, in his brief on appeal to the Mississippi Supreme Court (attached as an Appendix to the Petition for Certiorari in this case), petitioner was "an

uneducated, superstitious" Negro who "worshipped at the shrine of, sorcery, voodoo and witchcraft, and who was easily influenced by anything smacking of the supernatural."

(b) *Police pressure prior to petitioner's confession.*

According to the uncontradicted evidence in this case, petitioner was illegally arrested at four in the morning on July 30, 1961, when he was routed out of bed in his home without a warrant or probable cause (see II A, supra). Along with several other Negroes he was taken to a jail to be questioned and placed in a line-up for identification by a white girl who claimed that she had been raped by a Negro (R. 76).

For twelve hours following his arrest petitioner was continually questioned by five state officers at least two of whom were armed (R. 70, 78). During this period, petitioner was not afforded a preliminary hearing before a judicial officer as required by Mississippi Law (see IB, supra). He did not have the advice of counsel, nor was he allowed communication with anyone other than law enforcement officers and James Matlock, one of his accusers (see I, supra). Apparently, petitioner was given nothing more to eat during his twelve hours of questioning than some breakfast. Possibly, he was given nothing at all.[34]

At 11, or 11:30 A.M. petitioner was transported from Madison County to Hinds County where he was forcibly subjected to a polygraph test (R. 77). He was told by the officers administering the test that the polygraph proved

---

[34] Direct examination of Officer Charles Snodgrass (R. 73):

Q. Do you know whether or not he had been fed that day? A. I don't know to my own knowledge.

Direct examination of Sheriff Billy Noble (R. 77):

Q. Do you know whether or not he was fed at any time during the day prior to the confession? A. Breakfast facilities were available to him at the Canton jail.

he was lying, and that he might as well confess (R. 80). In addition, he was informed that he had already been implicated by James Matlock with whom he was confronted (R. 74, 77).

According to petitioner's testimony, which is denied, he was threatened with violence if he did not confess:

> "if I didn't say I did it him (i.e., Mr. Snodgrass) and the sheriff would bring me back to Canton and put me in the county jail and turn me over to a mob crowd" (R. 88).

The record is barren of any evidence that petitioner was told he had the right to remain silent.[35]

After these events, and in the presence of five officers (R. 93-94) and James Matlock (R. 76, 78), petitioner confessed at 4 P.M. (R. 76).

(c) *Police pressure after the alleged confession.*

This Court has considered events subsequent to a confession in determining whether the confession was given voluntarily:

> "It is said that these events are not germane to the present problem because they happened after the confession was made. But they show such a callous attitude of the police towards the safeguards which respect for ordinary standards of human relationships compels that we take with a grain of salt their present apologia that the five-hour grilling was conducted in a fair and dispassionate manner." *Haley* v. *Ohio*, 332 U.S. 596, 600.

---

[35] In contrast to the power wielded against petitioner, such warnings were at most trivial. In any case, petitioner can hardly be held accountable for not demanding counsel in view of his mentality. *Fikes* v. *Alabama*, 352 U.S. 191, 193; *Gallegos* v. *Colorado*, 370 U.S. 49, ——.

The day after the alleged confession, July 31, 1961, petitioner was transferred by court order from the Madison County jail to the Hinds County jail for "safekeeping" (R. 2). He was held incommunicado, even his wife being denied the right to visit him.[26]

Two days after his arrest, on August 1, 1961, petitioner was finally taken before a judicial officer. Without benefit of counsel he waived a preliminary hearing.

Amazing as it may seem in this capital case, petitioner had no counsel until a local white attorney was appointed by the court at the time of his arraignment on September 21, 1961, fifty-three days after his arrest, and only four days before trial.

In view of the "totality of circumstances" just set forth, can it possibly be maintained that the confession in this case was not the result of an "overborne will"? We think not. *Malinski* v. *New York*, 324 U.S. 401, 404-407; *Lomax* v. *Texas*, 313 U.S. 544; *Reeves* v. *Alabama*, 348 U.S. 891.

Twelve hours of continuous questioning, beginning early in the morning, without benefit of counsel or communication with friends, after an illegal arrest and during a period of illegal detention, is itself sufficient to vitiate the confession. *Spano* v. *New York*; 360 U.S. 315, 322.

But, there is much more. This Court has emphasized the importance of subjective elements in determining whether a confession was the result of an act of free will:

> "The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be

---

[26] Affidavit of Mary Nell Smith, Appendix.

overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal." *Stein* v. *New York*, 364 U.S. 156, 185.

The accused in this case is a young, illiterate Negro charged with raping a white girl in Mississippi. The fear which a Negro in the Deep South feels when so accused obviously makes him especially susceptible to the coercive impact of the forces brought to bear by the police.

According to their own admissions, the police told petitioner shortly before he confessed that the polygraph proved he was lying when he denied his guilt. Obviously petitioner had no way of knowing that the results of a polygraph test are not admissible evidence. In view of his ignorance, fear, and apparent superstitiousness, there can be little doubt that the use of the polygraph must have terrified petitioner and convinced him that his situation was hopeless.

As if this were not enough, petitioner was told by the police and by James Matlock that Matlock had already implicated him in the alleged crime, and he was forced to confront Matlock, his accuser. Afraid, alone, without counsel, ignorant of his right to remain silent, his fate already sealed by a machine which he could not understand, accused by one who he thought was his friend, no reason could possibly have appeared to petitioner for not confessing.

An "uneducated, superstitious" Negro who "worshipped at the shrine of sorcery, voodoo and witchcraft and who was easily influenced by anything smacking of the supernatural" is no match for the police and the polygraph.

D. The Jury Was Misdirected by Wrong Constitutional Standards When Instructed by the Trial Court on Its Treatment of the Alleged Confession.

The jury was instructed, with respect to the confession introduced against petitioner that

> "... if you believe from the evidence that the alleged confession was untrue you should disregard it or if you believe from evidence that it was made under the influence of hope or fear, you may take this into account in determining what weight or credit, if any you may attach to it as evidence" (R. 7).[37]

By its terms, the instruction informed the jurors that even if they found that the confession was obtained involuntarily—that is, through hope or fear—they could nonetheless take it into consideration in arriving at their verdict. This instruction is constitutionally invalid, for a confession obtained involuntarily must be excluded from evidence entirely. *Reck* v. *Pate*, 367 U.S. 433; *Culombe* v. *Connecticut*, 367 U.S. 568.

It is far from clear what the trial judge had in mind in speaking of "hope or fear" in the context of the superficial instruction he gave the jury. Perhaps, like the court below, it was "fear . . . of the truth and its consequences" (R. 127). If so, he should have spelled it out. But it is entirely consistent with the testimony presented to the jury to conclude that it was the "hope or fear" engendered by twelve hours of interrogation by five armed law enforcement officers, plus a polygraph test, of a poor Negro with two years of education, fearful of mob violence in a rural

[37] The record does not show whether or not this was a requested instruction, but no objection was offered. In any case, the failure of petitioner's court-appointed counsel to note its constitutional defects is but one more example of his ineffective representation.

Mississippi town. Because of this cursory and ambiguous instruction, the jurors could reasonably have concluded that even if the confession had been induced involuntarily through fear, it could nonetheless be weighed as evidence.

The "determination of the admissibility of confessions is, of course, a matter of local procedure." *Rogers* v. *Richmond*, 365 U.S. 534, 545, n. 3. Mississippi practice purports to leave the question of admissibility of a confession entirely in the hands of the trial judge. *Brooks* v. *State*, 178 Miss. 575, 173 So. 409; *Forman* v. *State*, —— Miss. ——, 70 So.2d 848; *Jones* v. *State*, —— Miss. ——, 88 So.2d 91. Once admitted, the jury may "give it such weight and credibility as they think it is entitled. They should not reject it entirely unless they believe from the evidence it is false." *Brooks* v. *State*, 173 So. at 411.

This may be a perfectly constitutional practice in theory.[38] However, once the jury is led to believe that in considering the weight to be assigned a confession, it has authority to consider those facts which are necessarily components of a determination whether the confession is admissible, it must be instructed in accordance with correct constitutional standards. *Rogers* v. *Richmond*, *supra*, at 544-546, 547-48.

In *Lyons* v. *Oklahoma*, 322 U.S. 596, 601, this Court said:

> "The question of how specific an instruction in a state court must be upon the involuntary character of a confession is, as a matter of procedure or practice, solely for the courts of the state. When the state-approved instruction *fairly raises the question of whether or not the challenged confession was voluntary*, as this in-

[38] But compare the federal practice, where both judge and jury must pass on admissibility. *Wilson* v. *United States*, 162 U.S. 613; *Smith* v. *United States*, 268 F.2d 416, 421.

struction did, the requirements of due process, under the Fourteenth Amendment, are satisfied and this Court will not require a modification of local practice to meet views that it might have as to the advantages of concreteness." (Emphasis added.)

Oklahoma practice, unlike Mississippi practice, allows the jury to pass on a confession's admissibility subsequent to the trial judge's initial determination of admissibility, and the Court in *Lyons* found that the jury had been adequately instructed on the constitutional standards it was to apply. Among other things, the jury was told that the confession was to be "rejected if obtained by punishment, intimidation or threats." Though even that charge leaves much to be desired (see *Culombe* v. *Connecticut*, *supra*, at 603-606), it can at least be said that the jury was explicitly instructed that it must exclude the confession if it was found to be involuntary.[39]

In the case at bar, the jurors were told to consider whether the confession was obtained by "hope or fear," though the meaning of that phrase was undefined. They may well have considered, therefore, those elements of "hope or fear" that constitute the basis of a finding that the confession was involuntary, "i.e., the product of coercion, either physical or psychological . . ." *Rogers* v. *Richmond*, *supra*, at 540. If so, they should have excluded the confession from their deliberations. However, contrary to *Lyons*, they were not expressly so instructed. Consequently, the jury was "misdirected by wrong constitutional standards." *Rogers* v. *Richmond*, *supra*, at 545.

---

[39] See too the charge in *Stein* v. *New York*, 346 U.S. 156, 173, n. 17.

Conclusion

Petitioner was arrested without probable cause, held in detention unconstitutionally, subjected to coercive forces until he confessed, denied counsel at a crucial pre-trial juncture, denied the right to counsel for fifty-three days, and finally was represented ineffectively at trial by his court-appointed attorney.

From the time of his arrest until the day of his conviction, petitioner was treated unfairly by every agency of the state with which he had contact. He was deprived of due process of law every step of the way. Consequently, petitioner's conviction below must be reversed.

Respectfully submitted.

Melvin L. Wulf
Rowland Watts
American Civil Liberties Union
156 Fifth Avenue
New York 10, New York

Morris B. Abram
575 Madison Avenue
New York, New York

Attorneys for Petitioner

Stanley A. Zimmerman
Norman Dorsen
David N. Ellenhorn
William L. Higgs
Of Counsel

March, 1963

APPENDIX

Affidavit*

STATE OF MISSISSIPPI
COUNTY OF HINDS

I, Mary Nell Smith, of 106 Church Street, Canton, County of Madison, State of Mississippi, make the following statement on my own free will:

1. My husband, William Smith, Jr., was arrested about 2:00 a.m. on Sunday, July 30th, 1961, by Madison County deputy sheriff, Dick Stone and another officer. I do not know his name. My husband was taken to the Madison County Jail; we did not see him again until about 7:00 or 7:30 p.m. of the same evening. Sheriff Billy Noble, State Highway Patrol Officer Charles Snodgrass, Allen Halbert, city policeman, and several other officers who I did not know brought him to our house. They drove up in two cars.

When the officers brought my husband into the room, I saw that my husband's head had been cut open by a blow, as he later told me. He did not have a cut on his head that morning about 2:30 a.m. when the officers first took him away. Others in the house also saw this cut on his head—my brother, Fred Jones, Jr., my mother, Julia Jones, my step-father, Fred Jones, and a friend, Rosetta Body. My husband could not think clearly after he received the blow on the head. He spoke to one of the white police officers, calling him by my brother's name. My brother is a dark-skinned Negro. My husband also asked me who was the colored man wearing glasses in the room; he was talking about a white man who wore glasses there.

---

* The original of this affidavit & the four succeeding affidavits are in the office of petitioner's counsel.

Later my husband told me that they beat him again the second time at the Hinds County Jail with other prisoners looking on. He told me the names of the prisoners but I don't remember them now. He told me all this several weeks after he was picked up and jailed. When I asked him about the first beating, when he received the cut on the head after his arrest, he told me that Sheriff Billy Noble had hit him and this cut his head. He did not say what the sheriff struck him with at the time.

2. My husband was held incommunicado for a period of 30 days. He was not permitted to phone anyone, to call a lawyer, or to call any member of his family to tell us where he was being held. During this period, I phoned the sheriff, Billy Noble, many times, trying to locate my husband. The sheriff told me that my husband was not in the Madison County Jail, but he would not tell me where he was. I asked permission to visit my husband many times, but the sheriff would not let me.

An acquaintance from Madison County had been in Jackson and was arrested and jailed. He saw my husband there in the Hinds County Jail, knew him, and came and told me after this man (the acquaintance) was released. He brought a note from my husband, which my husband had dictated to another prisoner, because my husband cannot write.

3. The court appointed a lawyer, Mr. Jack Graves, on Friday, the day of the arraignment. The lawyer had not talked to my husband before this time. The trial date was set for the following Monday. This left only three days to prepare for the trial. On Saturday, I went to Mr. Graves office with my husband's cousin, Lola. He met us at the door and told us that he was too busy to talk. I told him that I had information that I felt he would need. The officers had taken a pair of khaki trousers from our house the night they arrested him; they thought he had worn

them that night. Three witnesses, Willie Leonard, Robert Johnson, and Jimmy Thomas, and our family as well, knew that my husband had worn grey pants that night. Mr. Graves was not interested in this information that I tried to give him. He told me that he had all the information he needed.

4. The night they arrested my husband, the officers took the khaki pants from our house. The pants were still damp. My husband had worn them while killing a chicken for my mother, then he took a bath, laid the pants on the floor by the tub that leaks and stepped out on them, using them for a rug. When he left the house to go out that Saturday afternoon, before dark, he was wearing grey pants, not the khaki pants. He was still wearing these grey pants when he returned home Sunday morning between 12:00 and 1:00 a.m.

I have read the following statements and attest that they are true and accurate to the best of my knowledge.

/s/ Mary Nell Smith
Mary Nell Smith

This is to certify that the above person did personally appear before me on Feb. 6, 1963, and affix her signature hereon.

/s/ Illegible
Notary

My commission expires on March 31, 1965.

Affidavit

STATE OF MISSISSIPPI
COUNTY OF MADISON

I, Robert Lee Johnson, of Post Office Box 170, Canton, County of Madison, State of Mississippi, make the following statement on my own free will:

I and a few of my friends, William Smith, Jr., Robert Lee Body, and another whom I do not remember, were playing a card game called Whist in Walters Snack Shack on July 29, 1961, Saturday, at about 4:00 or 4:30 p.m.

William Smith, Jr. had entered the grill between 4:00 and 4:30 p.m. and started playing Whist with us. I noticed that when William entered Walter's Snack Shack he was wearing a pair of grey cotton dress slacks. I do not remember when William left the Snack Shack, but it was just before dark.

I have read the preceding statements and attest that they are true and accurate to the best of my knowledge.

/s/ ROBERT LEE JOHNSON
Robert Lee Johnson

This is to certify that the above person did personally appear before me on February 7, 1963, and affix his signature hereon.

/s/ V. A. SIMS, Chancery Clerk

By /s/ HAZEL E. WEST DC

My commission expires on Jan. 1, 1964.

Affidavit

STATE OF MISSISSIPPI
COUNTY OF HINDS

I, ROSETTA BODY, of 217 Main, Canton, County of Madison, State of Mississippi, make the following statement on my own free will:

I entered the house where Mr. and Mrs. William Smith, Jr. were living with Mr. and Mrs. Fred Jones on Sunday, July 30, 1961, between 7:30 and 8:00 p.m. The police had returned William to the house, and they were searching the house for evidence. When I saw William, there was blood running from a cut on the back of his head. I could not see the size of the cut because of the hair that was covering it.

I have known William for about 5 years prior to his arrest. During this time I had lived about 1 block from his home. His wife is my first cousin, he and his wife had been very close friends of mine.

When I entered the house William did not recognize me. I carried my 11 month old baby into the house with me and this was the only person with me. Later, Mary, William's wife, told me that William had asked who the girl with the baby was, and who the boy was with her. When I entered the house there was no one with me but my 11 month old child.

I have read the preceding statements and attest that they are true and accurate to the best of my knowledge.

/s/ Rosetta Body
Rosetta Body

This is to certify that the above person did personally appear before me on February 8, 1963, and affix her signature hereon.

/s/ Illegible
Notary

My commission expires on 3/31 1965.

Affidavit

STATE OF MISSISSIPPI
COUNTY OF HINDS

I, JULIA MAE JONES, of 106 Church Street, Canton, County of Madison, State of Mississippi, make the following statement on my own free will:

Sometime after midnight the police officers came to the house and woke us up saying they wanted William. I did not know if William were home because he was not home when I went to bed. William was in bed and they made him dress and they carried him away. My daughter had asked deputy Stone what my son-in-law had done and he answered many things have been done tonight. I can't tell you now what William has done but I will tell you later. When William left the house I did not see any cuts on his head.

The officers returned to the house later in the day, Sunday, July 30, 1961, to get William's clothing. We gathered all of his clothing and put it in a paper shopping bag for them. They, the police officers, asked what pants he wore on Saturday, July 29, 1961, when he left the house. I told them I did not know for sure but I thought he was wearing a pair of grey dress trousers. They said no he was wearing a pair of khaki pants. William only had one pair of khaki pants and he wore them Saturday to do chores around the house. He had wore this pair of pants to kill a chicken for me. In the past, William had always made it a practice to dress in his best clothes on Saturday evening. Later, the officers found this pair of khaki pants in the dirty clothes and they said this is what he was wearing. My daughter explained that they were wet because he had killed a chicken in there and had used them to mop up the bath water that had spilled on the floor. I did not see William

when he left the house but I do know that the khaki pants were dirty because of the chores he had done around the house.

When William left the house about 4:00 p.m., Saturday, July 29, 1961, he did not return home between that time and when I went to bed. I do not know what time I went to bed, but I usually go about 9:00 p.m.

The officers brought William back home Sunday evening, July 30, 1961, about 7:00 p.m. The sheriff, Billy Noble, came into the house first to tell us that they wanted to search the house. Mr. Snodgrass, State Highway Patrol, brought William into the house. William had dried blood on his face and there was a cut about 1½ to 2 inches on the top of his head. When William left the house, he had no cuts on his head.

When they returned William to the house he acted very confused. He called one of the white police officers brother, a name he usually called my son, Fred Jones, Jr. By William, I have been referring to William Smith, Jr., my son-in-law.

I have read the preceding statements and attest that they are true and accurate to the best of my knowledge.

/s/ Julia Mae Jones
Julia Mae Jones

This is to certify that the above person did personally appear before me on February 8, 1963, and affixed her signature hereon.

/s/ Illegible
Notary

My commission expires on 3/31 1963.

Affidavit

I, William L. Higgs, an attorney of Jackson, Mississippi, hereby swear, affirm, and make affidavit to the following facts:

Prior to the Friday arraignment and appointment of counsel for William Smith, Negro, of Canton, Mississippi, I had been requested by his wife and mother-in-law through Rev. Thomas Johnson to represent him at his trial in Canton. Smith also requested me to represent him when I first saw him and talked to him in the Hinds County Jail in Jackson, Mississippi. On Friday morning, the day of the scheduled arraignment and appointment of counsel, I called Circuit Judge Leon Hendrick in the courthouse in Canton and told him that I had been requested to represent Smith and that I intended to do so. Judge Hendrick, who also presides in Hinds County, where I practice law, took about five minutes to make it very clear to me that I had no business in this case and that it would be dangerous for me to take the case. His own personal threat was clear to me. He said that Smith was having "a perfectly good attorney in Canton appointed to represent him." I followed his "suggestion." I did not represent Smith at this point in court. In addition, I felt that my life would be in great danger if I represented Smith in the emotion-charged atmosphere in Canton. I might add that I felt that it would be unwise to in this way further endanger my other civil rights activities that I had up to this point been able to carry on without too extreme and disabling reprisals.

/s/ William L. Higgs

Sworn to before me this 25th day of February, 1963.

/s/ MELVIN L. WULF

Melvin L. Wulf
Notary Public, State of New York
Qualified in New York County
Commission Expires March 30, 1963